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No. 234

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In the Supreme Court of the United States

OCTOBER TERM, 1962

TEXACO INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a-2a) is reported at 301 F. 2d 662. The opinion (Pet. App. B, 2b-5b) and order (*id.*, 1b) of the Federal Trade Commission are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1962 (Pet. App. A, 1a-2a). The petition for a writ of certiorari was filed on July 6, 1962. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that, under Section 5(c) of the Federal Trade Commission Act, it was without jurisdiction to review rulings by the Federal Trade Commission on the introduction of evidence or on the production and relevancy of documents from the files of the Commission, prior to the issuance of a cease and desist order.

STATUTE INVOLVED

Section 5(c) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45(c), provides as follows:

> Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that

such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

STATEMENT

On September 27, 1957, the Federal Trade Commission issued a complaint charging petitioner, Texaco Inc. (formerly The Texas Company), with violations of Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a), and of Section 5 of the Federal Trade

Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45 (R. 1a-8a),[1] in the Portsmouth-Norfolk-Virginia Beach, Virginia, area. The complaint was supplemented on March 31, 1959, to include similar activities in the Detroit, Michigan, area occurring after the filing of the original complaint (R. 9a). The proceedings on the complaint are currently pending before the hearing examiner, and there has been neither an initial decision by the hearing examiner nor a Commission determination whether a cease and desist order will be issued.

In the course of the hearing, petitioner offered for receipt in evidence copies of letters signed by Harry A. Babcock, the then Director of the Bureau of Investigation of the Commission (R. 48a), and applied for the disclosure by the Commission of "[a]ll documents evidencing the administrative construction of the meeting competition provisions" of the Robinson-Patman Act (R. 38a) and all communications relating to the March 31, 1959, supplementation of the complaint (R. 39a), and for a subpoena *duces tecum* and *ad testificandum* to the Secretary of the Commission for the production of such material (R. 60a). The material requested was extensive and covered Commission files for several years (R. 38a-43a). Petitioner claimed that the proffered letters and the demanded material from the Commission files were relevant to proof of prior administrative constructions of the "to meet an equally low price of a competitor" defense under Section 2(b) of the Clayton Act as amended by the Robinson-Patman Act (Pet. App. B, 2b-3b) and to petitioner's assertions that the supple-

[1] "R" refers to the printed Petition and Appendix filed by the petitioner in the court of appeals.

mentation of the complaint to include Detroit activities involved improper *ex parte* activities by members of the Commission (Pet. App. B, 3b).

The "Babcock" letters were admitted in evidence by the hearing examiner, after a colloquy as to whether the statements in the letters represented a construction of Section 2(b) by the Commission or merely a statement of the views of the then Director of the Bureau of Investigation of the Commission (R. 48a). On March 9, 1962, the Commission denied the application for the production of documents and materials from its files and for the subpoena to the Secretary (Pet. App. B, 4b). In its opinion accompanying the order of denial, the Commission, among other things, pointed out that only adjudicative and publicly-announced official Commission action might be pertinent to determining the "administrative interpretation" of a statute, and that internal memoranda and discussions were confidential, as was information and material identifying complainants (Pet. App. B, 2b-4b). The Commission further found that the information allegedly received on an *ex parte* basis might involve complainants not parties to the proceedings and hence could not be disclosed (Pet. App. B, 5a).

On April 5, 1962, petitioner applied to the court of appeals for an order requiring the Commission either (1) to appear by its Secretary and produce the documents, disclose them, and permit petitioner to adduce them in evidence, or (2) to dismiss the Commission's proceeding (R. 1-24). On April 10, 1962, the court of appeals denied the petition *per curiam*, holding that it did not have jurisdiction to intervene in, and to order the production of evidence at, a hearing contem-

poraneously being conducted by the Federal Trade Commission; that under Section 5(c) of the Federal Trade Commission Act (see pp. 2-3, *supra*), the application for review was premature; and that jurisdiction to review would not arise unless and until the Commission entered a cease and desist order (Pet. App. A, 1a-2a). The decree was without prejudice to whatever rights Texaco might have in the event of a subsequent review of an order against it to cease and desist (Pet. App. A, 2a).

ARGUMENT

The court of appeals was clearly correct in holding that Section 5(c) of the Federal Trade Commission Act[2] gave it no jurisdiction to entertain an appeal prior to the issuance of a cease and desist order, and "at this stage of the proceedings, [to] intervene and order the production of evidence at the present hearing now being conducted by the Federal Trade Commission" (Pet. App. A, 2a). Contrary to petitioner's assertions, the circuits are not in conflict on the question presented; and, as the court below noted (*ibid.*), petitioner has not cited any case which construed Section 5(c) or any similar statute as authorizing or requiring a review of evidentiary rulings by an administrative board or commission prior to a final order. The decisions of this Court clearly sustain the judgment of the lower court

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[2] The language of Section 11(c) of the Clayton Act, 38 Stat. 734, as amended, 15 U.S.C. (Supp. III) 21(c), parallels that of Section 5(c) on the question presented. Since Section 5(c) provides for judicial review, including review of rulings on evidence after entry of a cease and desist order, there is no issue involving 28 U.S.C. 1651, and petitioner does not urge questions under that provision as a reason for granting its petition (see Pet. 2, n. 2).

on the only question raised in the petition, and that question does not warrant review by this Court.

1. Section 5(c) of the Federal Trade Commission Act provides for an appeal only from a final cease and desist order of the Commission,[3] and for a review of excluding evidence rulings by a motion for leave to adduce filed in the court of appeals only upon such an appeal. Thus, jurisdiction is acquired by a court of appeals upon the filing of a petition for review by a person "required by an order of the Commission to cease and desist from using any method of competition or act or practice . . ." The prayer of the petition contemplated by the statute is "that the order of the Commission be set aside." The time for filing the petition is "sixty days from the date of the service of such order." One situs or venue is "where the method of competition or the act or practice in question was used." Upon the filing of the petition the court has jurisdiction, among other things, "to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed . . ." In addition, "either party" may move for leave to adduce additional evidence before the court. In the event that the court grants the application for leave to adduce additional evidence and orders further proceedings before the Commission, the Commission thereafter may "modify its findings . . ., or make new findings, . . ., and . . ., file such modified or new findings,

[3] Such an order can be entered only after a hearing and the filing of the findings and report required under Section 5(b) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45(b) and under Section 11(b) of the Clayton Act, 38 Stat. 734, as amended, 15 U.S.C. (Supp. III) 21(b).

. . . and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence." In short, the provisions that make up Section 5(c) are all in terms of, and assume the existence of, a pre-existing final cease and desist order of the Commission. Plainly enough, that statute is but one of a number of statutes codifying the general rule, long recognized by this Court, that interlocutory rulings by administrative agencies are not appealable while the proceedings to which they relate are still pending and before the agency's final order. *Securities and Exchange Commission* v. *Otis & Co.*, 338 U.S. 843; *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Adams* v. *Federal Trade Commission*, 296 F. 2d 861, 864-65 (C.A. 8).

2. The petitioner's assertions (Pet. 11-20) concerning *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, and *Communist Party of the United States* v. *Subversive Activities Control Board*, 254 F. 2d 314, are based on erroneous assumptions regarding the questions presented and decided in those cases. In both cases, unlike the case at bar, appeals were taken to the court of appeals from final administrative orders, and the question presented was whether timely and appropriate motions to adduce additional evidence had been made in the court of appeals in connection with, or after the initiation of the appeals from the final orders. In the *Consolidated Edison* case, where no motion to adduce was filed, the petitioners' claim was that an assignment of error served the same purpose. The holdings of both the Second Circuit (95 F. 2d 390, 397) and of this Court (305 U.S. at

226), rejecting that contention, emphasized that the statute provides a motion to adduce filed in the court of appeals as the appropriate remedy for the improper exclusion of evidence. The *Consolidated Edison* case does not hold, nor even intimate, that to preserve one's right to review of an exclusionary ruling there must be an appeal from such a ruling prior to a final administrative order. It merely holds that exclusionary rulings must be attacked by motion to adduce rather than by an assignment of error. The same question was at issue in the other cases cited by petitioner (Pet. 14), all of which involved statutory appeals from *final* administrative orders.

The *Communist Party* case likewise did not present a question of whether an appeal from a ruling on evidence may, or must, be taken prior to a final administrative order. The court of appeals decision reported at 254 F. 2d 314, was the second appeal from final agency orders, and the Communist Party did not on either appeal make a motion in the court of appeals to adduce additional evidence relating to the "Gitlow" memoranda but relied on an assignment of error. It was not until after the court of appeals opinion in the second appeal that the Communist Party filed any motion in the court of appeals to adduce the "Gitlow" memoranda. Thus the extracts from the opinion of the court of appeals in the *Communist Party* case cited by petitioner (Pet. 14-15) dealt with an attempt by the Communist Party to secure a reversal by the court of appeals of the Board's final order on account of a ruling on the production of evidence for which no motion to adduce had been filed in either the first or the second

appeal on the merits to the court of appeals.[4] The court of appeals' statement that its ruling "creates a right to interlocutory relief" (254 F. 2d at 323) appropriately describes the procedure required by the statute insofar as an opportunity is provided for the court of appeals to resolve evidentiary questions and to determine whether a reopening of the hearing is required before making a judicial determination on the merits. There is a clear distinction between provision for (i) interlocutory relief during the course of judicial proceeding to review a *final* administrative order and (ii) an interlocutory appeal taken during an administrative hearing. The former, which is authorized by Section 5(c), permits the court of appeals to defer a final ruling upon the merits until a more complete record is considered by the administrative agency; the latter, which is neither authorized nor required, would permit appeals even before the administrative agency has ruled on the merits of the case.[5]

[4] This Court noted that no motion to adduce on the "Gitlow" memoranda had been filed in the court of appeals (367 U.S. 1, 30).

[5] Petitioner's assertions that the government has taken the position that statutes similar to Section 5(c) require or authorize an appeal on evidentiary rulings prior to a final administrative order or determination are without foundation. The statements from the government's brief in the *Communist Party* case quoted by petitioner (Pet. 16, 17) plainly assumed a situation in which the court had a final agency order before it (as, of course, the court in the *Communist Party* case had).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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